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No. 86-58

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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FRED S. JAMES & CO. OF TEXAS, INC.

*Petitioner,*

Versus

EQUILEASE CORPORATION,
M/V SAMSON, M/V THOR, and M/V HERCULES, ETC.

*Respondents.*

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## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

The record does not present for review the questions stated on page i of the Petition for Writ of Certiorari. The essential question presented is:

Whether factual findings made in the courts below are appropriate for review by this Honorable Court.

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## OPINIONS AND JUDGMENTS OF COURTS BELOW

The Appendix to the Petition For Writ of Certiorari sets out the district court's opinion after trial on the merits; the original opinion of the U. S. Court of Appeals for the Fifth Circuit dated September 27, 1984; the opinion on rehearing of the United States Court of Appeals for the Fifth Circuit dated April 1, 1985; and the opinion on rehearing en banc of the U.S. Court of Appeals for the Fifth Circuit dated April 25, 1986, as amended May 5, 1986 and May 28, 1986. Those opinions are not reproduced again in this brief but are referred to herein by citation to the appro-

priate page in the Appendix to the Petition For Writ of Certiorari.

The opinion on rehearing en banc of the U. S. Court of Appeals for the Fifth Circuit, dated April 25, 1986, is published at 793 F.2d 598 (5th Cir. 1986).

## STATEMENT OF THE CASE

### (A) Course of Proceedings and Disposition in Trial Court.

This matter involved three consolidated actions in the trial court at one time. The lowest numbered case, Civil Action No. 80-4785, was dismissed prior to the trial which is the subject of this petition. In Civil Action No. 81-112, Equilease Corporation (hereinafter Equilease) filed a separate foreclosure proceeding against the M/V SAMSON, the M/V HERCULES, and the M/V THOR (the vessels) in order to foreclose on Preferred Maritime Mortgages held by Equilease on each of these vessels. On January 19, 1981, Fred S. James & Co. of Texas, Inc. (hereinafter James), pursuant to a motion, filed a Complaint In Intervention in Civil Action No. 81-112, claiming a state privilege and a maritime lien upon each of the three vessels as a result of alleged unpaid insurance premiums. James also asserted personal claims against Equilease and the owners of each of the vessels, Unilease No. 13, Inc., Unilease No. 14, Inc., and Unilease No. 20, Inc., in the intervention.

Additionally, on January 19, 1981, James filed a separate lawsuit, Civil Action No. 81-234, against Equilease, Dunnamis Offshore Towing, Inc. (hereinafter Dunnamis), Unilease No. 13, Inc., Unilease No. 14, Inc., and Unilease No. 20, Inc. and each of the three vessels *in rem*, alleging substantially identical

claims as contained in the previously mentioned intervention.

On January 3, 1983, the trial court conducted a three day non-jury trial of what remained of the consolidated matters, which basically involved the *in personam* and *in rem* claims asserted by James. After the trial, the trial court took the matter under submission. On March 18, 1983, the trial court rendered written Findings of Fact and Conclusions of Law which granted judgment in favor of James *in personam* against Dunnamis and *in rem* against each of the three vessels allowing a state privilege for the amount sued on, plus legal interest from date of judicial demand, together with 10 percent as attorney's fees and all costs of the proceedings, subject to submission by James within thirty days of a statement showing the proportion of premiums for each particular vessel. The trial court also, at that time, voided the Preferred Maritime Mortgages held by Equilease Corporation insofar as the claims of James are concerned but denied a maritime lien on the basis that insurance was not a necessary under the Federal Maritime Lien Act.

On March 28, 1983, a motion was brought on behalf of each of the three vessels for a new trial seeking an amendment of the trial court's Findings of Fact and Conclusions of Law. The grounds for this motion were that the trial court erred in awarding James attorney's fees against the vessels and erred in granting James a state privilege for premiums due for insurance on the three vessels pursuant to Louisiana Civil Code Article 3237. After oral argument of the Motion For A New Trial, the trial court by Memorandum Order dated May 12, 1983, amended its Judg-

ment to eliminate the imposition of attorney's fees. However, stating orally that it saw no distinction between the underlying debt and the privilege granted by state law, the trial court ratified and confirmed its Judgment allowing a state privilege against each of the three vessels pursuant to Louisiana Civil Code Article 3237.

On May 18, 1983, the trial court signed a Judgment *in personam* against Dunnamis and *in rem* against each of the three vessels in the total amount of $315,820.92, allocating the damages proportionately among the three vessels. On May 26, 1983, Equilease, Unilease No. 13, Inc., Unilease No. 14, Inc., Unilease No. 20, Inc. and each of the vessels filed a Notice of Appeal from the final Judgment in this matter. On June 1, 1983, James filed a Cross Appeal from the same Judgment. Dunnamis has not taken any appeal.

In the Statement Of The Case relating to Course of Proceedings and Disposition in the Trial Court appearing in the Petition For Writ of Certiorari filed herein, James referenced the holdings of the trial court. It should be noted that James failed to mention therein that the trial court specifically found that Dunnamis was not the agent of Equilease.[1]

**(B) Course of Proceedings and Disposition in the Appellate Court.**

The statements and explanations in the Petition For Writ of Certiorari relative to the course of proceedings and disposition in the appellate court are essentially correct and need no further explanation.

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[1] Appendix to Petition of Writ of Certiorari at page A-11.

**(C) Statement of Facts**

The facts stated in the Petition For Writ of Certiorari substantially differ from the facts found in the trial and appellate court opinions. The accurate facts are those stated in the lower court opinions. Rather than merely reiterating those facts, respondents respectfully refer this Honorable Court to the facts found in the lower court opinions.[2] The difference between the facts stated by Petitioner and those found in the lower court opinions merely emphasize that Petitioner's challenges herein are truly challenges to findings of fact made below.

## SUMMARY OF ARGUMENT

James essentially complains of findings of fact in the lower courts. Such findings of fact are inappropriate for review by writ from this Honorable Court. None of the considerations in this Court's Rule 17 for issuance of a writ is present.

James' main complaint is that the Fifth Circuit En Banc erred in finding that it was clear and uncontradicted from the transcript and record that James did not rely on the credit of the vessels when it advanced the insurance premiums. The finding that James clearly did not rely on the credit of the vessels is a proper factual finding inappropriate for review by writ from this Honorable Court. Moreover, such a finding is completely in line with the well established decisions of this Court allowing the party at-

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[2] Appendix to Petition of Writ of Certiorari at pages A-3 through A-13; A-24 through A-28; A-47 through A-50; A-69 through A-74; A-95 through A-97.

tacking the lien to prove lack of reliance on the credit of the vessel.

In addition, James argues that the finding of the Fifth Circuit En Banc that James did not rely on the credit of the vessels was a *reversal* of a factual finding by the trial court. Such a finding by the Fifth Circuit En Banc was not a reversal of a finding of fact made by the trial court. The Fifth Circuit correctly noted that the trial court did not make a factual finding concerning reliance by James because no maritime lien was awarded by the trial court.[3] The Fifth Circuit correctly proceeded to examine the relevant parts of the transcript and record and found it "clear" and "uncontradicted" that James did not rely on the credit of the vessels. Such a finding is not appropriate for review by writ from this Court and is in line with well-established decisions of this Court allowing undisputed inescapable factual findings by an appellate court.

James also challenges the factual finding that Dunnamis was the agent of Equilease because of the bareboat charter agreement between the parties.The lower courts specifically addressed this factual issue and have concluded that Dunnamis was not the agent of Equilease.[4] Once again, such factual finding is inappropriate for review by writ from this Court.

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[3] Appendix to Petition of Writ of Certiorari at page A-95.

[4] Appendix to Petition of Writ of Certiorari at page A-11; A-65 through A-66.

## ARGUMENT

### I. Finding That James Did Not Rely On The Credit of the Vessels

James mainly complains herein that the Fifth Circuit En Banc erred in finding that James did not rely on the credit of the vessels. Not only is such a factual finding inappropriate for review by writ, but also is completely in line with well-established jurisprudence emanating from this Court.

The en banc opinion of the Fifth Circuit noted that because the trial court had found that James was not entitled to a federal maritime lien pursuant to *Learned v. Brown*,[5] the trial court did not make a finding on whether James relied on the credit of the vessels.[6] The Fifth Circuit En Banc then specifically examined the relevant parts of the transcript and record and found that:

> [t]he transcript and record make it *clear* that James did not rely on the credit of the insured vessels when advancing the money for the premiums, but rather relied on the credit of Equilease and Dunnamis. The *uncontradicted* testimony and the concession made by James in its brief overcomes the presumption that James relied on the credit of the vessel.[7]

(emphasis added).

The Fifth Circuit En Banc opinion specifically referenced the relevant parts of the transcript and re-

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[5] 94 F.876 (5th Cir. 1899).

[6] Appendix to Petition of Writ of Certiorari at page A-95.

[7] Appendix to Petition of Writ of Certiorari at page A-97.

cord that made it clear and uncontradicted that James did not rely on the credit of the vessels. The Fifth Circuit referenced the specific testimony of the James manager, Keith Hargrove, who handled the pertinent account and who testified at trial that James relied only on the credit of owners and charterer as follows:

> Hargrove was asked on cross examination, "What did you rely on for payment of those insurance premiums?. . . . Who or what did you rely on?" He responded that it had been James' understanding "from the very beginning" that Equilease, whether directly or indirectly was being relied upon, and that James was receiving money from Dunnamis that had been furnished to Dunnamis by Equilease. When the cross examiner probed, "So you are saying you relied *only* on Dunnamis, Equilease, and/or Eltra, is that a fair statement?" Hargrove replied, "That's a fair statement."[8] (Emphasis added).

The Fifth Circuit En Banc opinion further specifically noted the "concession" in James' original brief filed in the Fifth Circuit that James did not rely on the credit of the vessels. The Fifth Circuit specifically pointed out that:

> James itself states in its original brief filed in this court: "The Unilease Companies were totally funded for the operations of the Vessels by Equilease and it was the credit of

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[8] Appendix to Petition of Writ of Certiorari at page A-95 through A-96.

> Equilease upon which all parties placed *total reliance.*[9] (Emphasis added).

James' request that a writ be issued to review such a factual finding is inappropriate. The transcript and record clearly support such a finding of uncontradicted facts which permits only one resolution of the factual issue. Moreover, James' suggestion that such finding is contrary to established law is simply wrong.

James argues that the Fifth Circuit En Banc erred in reversing a factual finding of the trial court. The Fifth Circuit did not reverse any factual finding. To the contrary, the Fifth Circuit En Banc opinion made it clear that the trial court did not make a finding concerning reliance by James. In absence of such a finding, the Fifth Circuit En Banc properly and legitimately examined the transcript and record, finding the transcript and record "clear" and "uncontradicted."[10] It is well established in this Court that an appellate court can examine a transcript and record in absence of a factual finding by the trial court and draw inescapable factual conclusions susceptible of only one resolution. *Kelley v. Southern Pacific Company;*[11] *Dayton Board of Education v. Brinkman;*[12] *Bigelow v. Virgina;*[13] *Levin v. Mississippi River Fuel Corporation;*[14]. This is especially true when the appellate court is in as good a position to evaluate the

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[9] Appendix to Petition of Writ of Certiorari at page A-96.

[10] Appendix to Petition of Writ of Certiorari at page A-97.

[11] 419 U.S. 318 (1974).

[12] 443 U.S. 526, 534-537 (1979).

[13] 421 U.S. 809, 826-827 (1975).

[14] 386 U.S. 162, 170 (1967).

evidence as the trial court, such as when the facts are undisputed and do not depend on the credibility of witnesses. *United States v. Oregon State Medical Society;*[15] *Gulf Towing Company, Inc. v. Steam Tanker Amoco New York;*[16] *Armstrong v. Collier;*[17] *Sbicca-Del Mac, Inc. v. Milius Shoe Company;*[18] *Talley v. U. S. Postal Service.*[19]

In the case presently before this Court, the facts at issue are clear and undisputed. When asked, James admitted at trial and in brief that it did not rely on the credit of the vessel. Instead, James specifically relied "totally" and "only" on the credit of Equilease and Dunnamis. There is no contradictory testimony or evidence. Only one reasonable resolution of this fact is permitted. Effective judicial administration requires the appellate court to draw this inescapable factual conclusion.

James also erroneously argues that the Fifth Circuit En Banc decision is contrary to decisions of this Court in *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*[20] and *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of California,*[21] as well as court of appeals decisions in *Farrell Ocean Services v. United States,*[22] and *Farwest Steel Corporation v.*

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[15] 343 U.S. 326 (1952).

[16] 648 F.2d 242 (5th Cir. 1981).

[17] 536 F.2d 72, 77 (5th Cir. 1976).

[18] 145 F.2d 389, 400 (8th Cir. 1944).

[19] 720 F.2d 505 (8th Cir. 1983).

[20] 254 U.S. 1, 41 S.Ct. 1 (1920).

[21] 310 U.S. 268, 60 S.Ct.937, 84 L.Ed. 998 (1940).

[22] 681 F.2d 91 (1st Cir. 1982).

*Barge SEA-SPAN 241.*[23] To the contrary, those decisions support the holding of the Fifth Circuit in this matter.

James fails to explain anywhere in its Petition how the en banc opinion herein is contrary to *Piedmont & George's Creek Coal Co., supra.*[24] *Piedmont and George's Creek Coal Co., supra,*[25] holds only that the creditor of the vessel does not have the burden of proving reliance on the credit of the vessel. The decision does not hold that the owner or vessel cannot overcome the presumption and prove that the creditor did not rely on the credit of the vessel.

*Piedmont and George's Creek Coal Coal Co., supra,*[26] is also supportive of respondents' position herein in two other aspects. First, the decision supports the proposition that findings of fact are normally not appropriate for review by this Court. Second, the decision supports the argument that a maritime lien can only arise if the services or supplies are physically furnished to the vessel. In the event that this Court decides to grant the Petition requested herein, respondents reserve the right to argue on the merits that James is not entitled to a maritime lien for all the reasons enunciated in the en banc brief filed by respondents in the U. S. Court of Appeals For The Fifth Circuit, including: that James failed to prove it was legally subrogated to the claims of the insurers; that marine insurance was not furnished to the ves-

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[23] 769 F.2d 620 (9th Cir. 1985).

[24] 254 U.S.1, 41 S.Ct. 1 (1920).

[25] 254 U.S.1, 41 S.Ct. 1 (1920).

[26] 254 U.S.1, 41 S.Ct. 1 (1920).

sels; that marine insurance is not a necessary for the benefit of the vessels; and that any right to lien status was extinguished when James was paid.

*Dampskibsselskabet Dannebrog, supra,*[27] is likewise not contrary to but supports the en banc decision of the Fifth Circuit herein. That decision only holds that the creditor does not have to prove reliance on the credit of the vessel. That case does not withdraw the opportunity for the vessel owner to prove that the creditor did not rely on the credit of the vessel. James appears to assert that the presumption that the creditor relied on the credit of the vessels is irrebuttable. The well-established case law is clearly contrary to such an assertion.

*Farrell Ocean Services v. U.S, supra,*[28] supports the en banc decision at issue and is not contrary to it. In that case, the circuit court made it clear that the party attacking the lien has the burden of overcoming the presumption of reliance by showing that the party rendering the service relied solely on the personal credit of the owners or charterers, citing *Marshall & Company v. THE PRESIDENT ARTHUR,*[29] for support as the leading case from this Court on waiver. In *Farrell Ocean Services, supra,*[30] the Court simply found that the factual circumstances did not prove lack of reliance on the credit of the vessel. In the case presently before this Honorable Court, the record is clear and uncontradicted. James specifically testi-

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[27] 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 998 (1940).

[28] 681 F.2d 91 (1st Cir. 1982).

[29] 279 U.S. 564 (1929).

[30] 681 F.2d 91 (1st Cir. 1982).

fied that it did not rely on the credit of the vessels. There is no need to examine any other factual circumstances. The testimony speaks for itself.

In its Petition, James alleges but does not explain how the en banc decision herein is contrary to *Farwest Steel Corp., supra.*[31] *Farwest Steel Corp., supra,*[32] upholds the law that a maritime lien does not arise unless the lienholder relies on the credit of the vessel. More specifically, this decision relies on *Marshall & Co., supra,*[33] for the proposition that where a supplier relies on the contractor and not the barge as a source of payment, a maritime lien will be denied.[34] *Farwest Steel Corp., supra,*[35] also supports the holding that the item must be supplied "to" the vessel in order to be entitled to maritime lien status.

In the leading case on the issue, this Court in *Marshall & Co., supra,*[36] addressed the issue of waiver of a maritime lien. The furnisher of the supplies wanted additional security from the owner of the vessel prior to furnishing the supplies. It was held that the Federal Maritime Lien Act is not construed to prevent a furnisher of supplies from waiving his right to a lien by agreement or otherwise. An express renunciation of the lien is not essential. This Court held that if the evidence shows that the owner and not the vessel was relied on for credit, a maritime lien does not attach.

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[31] 769 F.2d 620 (9th Cir. 1985).

[32] 769 F.2d 620 (9th Cir. 1985).

[33] 279 U.S. 564 (1929).

[34] 769 F.2d at 624.

[35] 769 F.2d at 620.

[36] 279 U.S. 564 (1929).

In the case presently before this Honorable Court on Petition For Writ of Certiorari, the facts are clear through the testimony that James relied "only" on the owners and not on the credit of the vessels. Such a fact does not give rise to a maritime lien. Such a finding is factual and completely in line with well-established decisions of this Honorable Court.

**II. Finding That Dunnamis Was Not The Agent of Equilease**

James argues that the bareboat charter agreement between Dunnamis and Equilease created an agency relationship between the parties. The trial court specifically addressed the issue of agency and held:

> Although Denning received "favorite son" treatment from Equilease throughout this period, this treatment did not make him the agent of Equilease.[37]

Additionally, the Fifth Circuit Court of Appeals addressed the argument by James that Dunnamis was the agent of Equilease rather than a bareboat charterer.[38] The Fifth Circuit Court of Appeals held that:

> The existence of agency is a question of fact which should not be reversed on appeal unless it is clearly erroneous. . . .[39]

The Fifth Circuit Court of Appeals held that the district court was not clearly erroneous in its conclusion that Denning was not the agent of Equilease.[40] The

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[37] Appendix to Petition of Writ of Certiorari at page A-11.

[38] Appendix to Petition of Writ of Certiorari at page A-65.

[39] Appendix to Petition of Writ of Certiorari at page A-66.

[40] Appendix to Petition of Writ of Certiorari at page A-66.

existence of agency is a question of fact which has been previously addressed by the trial court and the Fifth Circuit Court of Appeals. Such a question of fact is not appropriate for review by this Honorable Court and is not clearly erroneous under applicable law.

## CONCLUSION

In its Petition For Writ of Certiorari, James seeks review of findings by the Fifth Circuit Court of Appeals En Banc that James did not rely on the credit of the vessels and that Dunnamis was the agent of Equilease. Both findings involve questions of fact which are not appropriate for review by this Honorable Court pursuant to a writ of certiorari.

Moreover, the findings challenged by James are completely in line with well-established decisions of this Honorable Court. Respondents had the right to and did prove through the testimony of James itself that James did not rely on the credit of the vessels. Such testimony is clear and uncontradicted and permits only one resolution of such fact. In addition, the trial court and the Fifth Circuit Court of Appeals specifically addressed the issue of agency and found that Dunnamis was not the agent of Equilease. This Court should deny the Petition For Writ of Certiorari.

Respectfully submitted,

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